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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-219

HAROLD VINCENT TOLIVER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AT CINCINNATI

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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PETITIONER PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ENTERED IN THIS CASE ON JULY 5, 1974.

CITATION TO OPINIONS BELOW

Order of the Court of Appeals unreported filed July 5, 1974 (App. A7).

JURISDICTION

The Court of Appeals entered judgment on July 5, 1974 with time for filing this petition extending to September 3, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the warrantless search of a vehicle for false, forged and counterfeit gold coins was an unreasonable search under the Fourth Amendment, since the officers relied solely upon uncorroborated information from an undisclosed source where the informant had never had any personal dealings with the petitioner, and no underlying facts as to how or where the informant came by his information.

2. Whether agents should obtain a search warrant even if they have probable cause, if the information upon which they rely is received two days prior to the arrest and search, during which time the agents have mapped out the exact route which they foresaw the subject taking, and had ample opportunity to secure a warrant from any magistrate.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. Petitioner respectfully contends the Writ should be granted, as it presents issues important to the policies and processes of search and seizure not yet passed upon by the Court, but which will continue to be raised in other cases, concerning the sufficiency of probable cause when the search is not incident to the arrest, the officers relied solely upon an uncorroborated informer's tip, and did not secure a search warrant, although they had ample time to do so.

II. The petitioner has not received needed and proper relief by the Courts below.

STATEMENT OF THE CASE AND FACTS

Petitioner, Harold Vincent Toliver, was charged in a two-count indictment with possessing false, forged and counterfeit gold coins with intent to defraud unknown persons, and with fraudulently possessing altered United States coins in violation of Title 18, U.S.C. §485 and Title 18, U.S.C. §331. Petitioner filed a motion to suppress testimony which was overruled by the Trial Judge on July 20, 1973 (App. A1). On December 5, 1973 the Court found Toliver guilty as charged in the indictment and sentenced him to prison for a period of two and one-half years on each of the two counts of the indictment, the sentences to run concurrently with each other.

At the trial, evidence presented against Toliver consisted primarily of the following facts: On February 8,

1973, two United States Secret Service agents began surveillance of petitioner's home at approximately 5:30 a.m. One of the agents had previously received information from a confidential source to the effect that Toliver was going to deliver counterfeit gold coins from his home in Manchester, Tennessee to Guthrie, Kentucky. This delivery was to take place on February 8, at approximately 9:30 a.m. Petitioner was observed placing two cardboard boxes and a handcase in his car. At 8:00 a.m. Toliver drove to Nashville. The agents proceeded in separate cars, keeping petitioner under surveillance as he continued northward through Goodlettsville and Springfield, Tennessee. When Toliver stopped at a roadside trash barrel near the town of Sadlersville, Tennessee in Robertson County, one of the agents approached him and placed him under arrest. There was no arrest warrant or search warrant. Toliver got out of his car and one of the agents asked his permission to search the vehicle. Although Toliver asked that the car not be searched, the agents paid no attention to his objection, searched the car and seized counterfeit and altered coins. The Secret Service agents and Montgomery County deputies then took Toliver and his car to the Montgomery County Sheriff's Office in Clarksville, Tennessee. From Clarksville the petitioner was taken to Nashville and before a magistrate.

After the petitioner was convicted on each of the two counts, appeal was perfected to the United States Court of Appeals for the Sixth Circuit. A short order affirming the judgment of the District Court did not discuss the issues raised at any length (App. A7).

Petitioner is now properly before this Court by the Petition.

ARGUMENT

I.

The Warrantless Search of the Vehicle for False, Forged and Counterfeit Gold Coins Was an Unreasonable Search under the Fourth Amendment Since the Officers Relied Solely upon Uncorroborated Information from an Undisclosed Source Where the Informant Had Never Had Any Personal Dealings with the Petitioner, and No Underlying Facts As to How, When, or Where the Informant Came by His Information.

Petitioner submits that the search of the vehicle was unreasonable under the Fourth Amendment since it was undertaken without a search warrant, without probable cause to believe that contraband would be found, and was not undertaken incident to a lawful arrest. The arresting agents had neither a search warrant, nor an arrest warrant. Furthermore, since the arrest of petitioner and the search of the car were both based on a belief that the automobile contained counterfeit gold coins, the search may not stand as incident to the arrest. Most importantly, petitioner contends that the search was invalid because it was not based on probable cause.

In *Carroll* v. *United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Court held that contraband goods concealed and illegally transported in an automobile may be searched for without a warrant. However, such a warrantless search may not take place when there is no probable cause to believe that the vehicle contains contraband. The Court maintained that probable cause exists where the facts and circumstances within the arresting officers' knowledge and of which they had reasonably

trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense is being committed.

Petitioner contends that the agents did not have sufficient information to meet the test of probable cause set forth in *Carroll*. They relied on information which was received from an undisclosed source. The informant did not have direct personal knowledge that the petitioner was in possession of the counterfeit coins; he had never personally had any dealings with the petitioner in counterfeit or altered coins. The information he gave the agents about the transaction was a mere repetition of what he had heard from some other source. Furthermore, the informant's reliability was questionable because there had been no previous arrests as a result of information furnished by him. Petitioner submits that the informant's tip did not constitute "reasonably trustworthy information" as required by *Carroll*. The factors involved in the instant case regarding the informer's trustworthiness have been considered important in other cases where the sufficiency of an affidavit in support of a warrant has been questioned, and the affiant relied on information from an undisclosed source. *United States* v. *Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971); *Spinelli* v. *United States*, 394 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). In *United States* v. *Burch*, 471 F.2d 1314 (6th Cir. 1973), a warrantless search was upheld only after it was shown that the informant had previously had personal illegal dealings with the defendant, and that the arresting agents had received similar information from other informants. These factors are not present in the instant case.

The corroboration requirement is also not fulfilled. In *Burch*, the Court delcared that "where the initial impetus for an arrest is an unnamed informer's tip, the arresting officers must corroborate by independent investigation the information that the arrestees committed a felony or were in the process of committing a felony." *Id.* 471 F.2d at 1317. The agents saw the petitioner carry two cardboard boxes and a black handcase to the vehicle. Petitioner contends that this did not satisfy the corroboration requirement since the agents had no way of knowing what was in these containers and the informant had not described the type of container in which the coins were to be transported. Petitioner was also apprehended within the State of Tennessee; therefore, there could have been no corroboration of the report that the transaction was to occur in Guthrie, Kentucky. Petitioner respectfully contends that the arresting agents relied on information which was uncorroborated and which was not reasonably trustworthy and that the search, therefore, violated petitioner's rights under the Fourth Amendment.

II.

The Agents Should Obtain a Search Warrant Even If They Have Probable Cause, If the Information upon Which They Rely Is Received Two Days Prior to the Arrest and Search, During Which Time the Agents Mapped Out the Exact Route Which They Foresaw the Subject Taking and Had Ample Opportunity to Secure a Warrant from Any Magistrate.

Even if the agents had had probable cause to stop and search the automobile, they should have obtained a search warrant nevertheless. In *Chambers* v. *Maroney*, 399 U.S. 42, 50, 90 S.Ct. 1975, 1980, 26 L.Ed.2d 419 (1970) the Court declared that "neither *Carroll*, nor other cases

in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy which a warrant affords."

In *Coolidge* v. *New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), this Court declared that, "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Although it is true that the mobility of an automobile sometimes calls for a speedy arrest in order that the vehicle will not elude the officers or escape the jurisdiction, not all searches and seizures of automobiles are *per se* reasonable given probable cause. The *Coolidge* Court continued: "The rule that 'searches conducted outside the judicial process, without prior approval by judge or mmagistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions' is not so frail that its continuing vitality depends on the fate of a supposed doctrine of warrantless arrest." And in *Cady* v. *Dombrowski*, 93 S.Ct. 2523, 413 U.S. 433, 41 U.S. L.W. 4995 (1973), the Court recognized that the law in the area of automobile searches and seizures is by no means firmly established when it declared that ". . . the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web." *Cady* v. *Dombrowski, supra* at p. 4997.

One of the important factors considered in allowing the warrantless search in *Carroll* was the lack of forewarning and the possibility that the opportunity for arrest might be lost during the time it would take to seek a magistrate. In the instant case, the arresting agents had

two days forewarning and ample time to secure a warrant from a magistrate.

Courts have recognized that the time factor is a strong consideration in allowing the search of an automobile without a warrant. *United States* v. *Prince,* 301 F.2d 358 (1962). In *United States* v. *McCreary,* 455 F.2d 647 (1972) the Court noted that the warrantless search of the vehicle came only twenty minutes after the tip had been received.

The arresting agent in the instant case, however, received the information fully two days prior to the arrest and search. The officers had enough time to anticipate and map out the exact route which they foresaw the petitioner would take, posting agents along the way. Petitioner respectfully contends that there was no valid reason whatsoever for the failure of the agents to secure a search warrant from any magistrate along this route since they had ample forewarning and made extensive preparations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari has been mailed to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 30th day of August, 1974.

DALE QUILLEN
Attorney for Petitioner

APPENDIX

MOTION TO SUPPRESS TESTIMONY

(Filed March 12, 1973)

Comes the defendant, Harold V. Tolliver, and makes known to the Court that his automobile was searched by agents of the United States Secret Service in Robertson County, Tennessee on or about February 8, 1973. That said agents were acting without a warrant of search or other lawful authority to make a search of said automobile.

The defendant would further show unto the Court that said officers seized his 1973 Buick Electra automobile and other personal property which is more particularly described in an inventory which is attached hereto.

WHEREFORE, the defendant prays:

1. That he be granted a hearing upon this motion.

2. That upon said hearing, an order be entered suppressing the testimony of the agents of the United States Secret Service who made the search of the defendant's automobile and any other officers acting in concert with said Secret Service agents, insofar as said testimony may pertain to 190 gold coins alleged to be false or forged and 57 coins alleged to have been altered.

3. Further, that any property seized from the defendant which is not contraband be returned to him.

4. For any other and further relief to which defendant may be entitled generally.

File No: J-CO-1-22,878

ITEMS SEIZED FROM HAROLD V. TOLIVER'S RESIDENCE AND ANTIQUE SHOP

One Beretta hand gun, serial no. 885622, with six rounds in clip.

One Leather pouch containing one bottle of 21 Cft. Gold coins ($2½) and two $1.00 Cft. gold coins.

One .410 gauge shot gun, sawed-off, IRS No. 4966.

One double barrel .12 gauge shot gun, Bone Hill Brand, No serial number.

One .22 cal. Marlin Rifle, octagon barrel, Serial No. 442398

One percussion type antique rifle, .40 cal.

One envelope of business cards and receipts taken from brief case found in old stone fort collectors den.

$2.00 "Inflated States of America" reproduction note.

46 miniature reproductions of $1.00 silver certificates.

One canvass bag containing 99 rolls of nickels and one loose roll of nickels of various dates.

One canvass bag containing 53 rolls of pennies and 261 pennies loose, of various dates.

90 Individually—mounted pennies of various dates.

7 Individually—mounted nickels of various dates.

4 individually—mounted dimes of various dates.

One california gold token.

27 pennies in paper envelopes.

73 Reproductions of $20 Federal Reserve Notes.

79 Reproductions of $5.00 Federal Reserve Notes.

One 1804 Reproduction of Silver Dollar.

One ½ of a silver dollar, Mounted.

One black ring box.

23 Counterfeit gold coins of various denominations and dates.

J-CO-1-22,878

ITEMS FOUND IN AUTOMOBILE OF TOLIVER

1 Box containing 12 pocket knives inscribed "Coca Cola"

8 "Happy Bird" Novelty Toys

3 Small boxes containing minature soft drinks

1 Box containing *Case* "Bowie Knife & Sheath"

1 Box of small mirrors

1 Rocky Ford Cigar Box with various campaign type buttons & key chains

1 Carton Winston Cigarettes minus one pack

43 Small paper bags containing different Chewing Tobacco Metal Tags

32 Plastic & Paper coin containers

50 small sheets with printed tobacco seals approx. 24 seals to a sheet

(Approx)

2 Plastic sheets with 20 slots for samples of metal chewing tobacco tags

8 Plastic sheets with 20 slots for displaying metal tobacco tags

1 Manilla envelope containing various size plastic containers for coins

1 Red box containing approx 100 tobacco metal tags enclosed individually and approx. 20 loose tags in the box

1 Small box containing various Presidential campaign buttons

12 Oversize Apollo Campaign-type buttons

1 Box containing Sans Sousi Perfume ½ Fl. Oz.

1 Box containing Mystice Perfume ½ Fl. Oz.

1 Bottle Shibui Perfume 1 Fl. Oz.
1 Empty Watch Case
2 Empty ring boxes
1 Black pocket magnifying glass
10 Plastic envelopes
1 Coffee County, Tennessee Constable Badge issued August 1, 1968
35 Glass paper weights
5 Boxes playing cards
1 Box containing approximately 75 small glass candle holders
1 Box Glass Insulators
7 Brass Tokens with inscriptions
1 Alum. Token with inscription
25 Pornographic paperback books
11 Pornographic Magazines
11 Wooden Wall Placques
1 Coin Magazine
43 Small pornographic cartoon-type booklets
1 Steno Notebook with handwritten notes
1 Small Box empty coin holders
1 Pkg. of approx. 200 plastic coin protectors
1 Ring Sizer
2 300W Movie Flood Lights
2 "Mystery of Black" After Shave
1 Box of Four 1.5 Volt Batteries
1 Large box containing 8 small boxes of pocket knives and 2 large boxes of pocket knives
1 Fishing Tackle Box containing various assortment of pocket knives
1 Leather container containing asst. of pocket knives

1 Pink suitcase containing an assortment of pens, pocket knives, etc.
1 Pint Imported Canadian Club Whiskey
1 White paper bag containing arrowheads
1 Box containing 87 pornographic books (paperbacks)
76 Reels of pornographic film
1 8mm GAF Movie Projector
1 GAF Super 8 Zoom Movie Camera
1 GAF Twin Lamp Movie Light
1 Roll Color Movie Film 8 mm
1 Carrying case for camera
1 Tape Player and two speakers
23 Tapes for Tape player in black box
2 Boxes containing 2 bottles each of ink—Stamp pad and rubber stamps
1 Box containing knife handles and rods
1 Box containing 6 metal serving trays
1 Box containing 18 mason jars
4 Plastic bottles
2 Pairs of eyeglasses
1 Large Box containing the following:
    1 Small box containing approx 500 small mirrors
    1 Small box of FOBS
    5 Metal Desk paper weights
    7 Pearl Handled Pocket Knives
    Approx. 20 Calendar Pictures
    2 Knife books
    1 Antique Book
    5 USN Knives in sheaths

1 Partial box of staples

Various mags

2 Rulers

2 Metal stamp plates

5 Plastic boxes with 2 knives each

1 Cotton bank bag "Citizens & Southern National Bank, Atlanta, Ga.

Several Sheets of blank address labels

Partial roll of scotch tape

110 ½ Dollars with various dates

1 Kennedy Half Dollar

1 One Ounce of Silver Eagle

1 Set of Canadian Coins (6 coins)

5 $1 Silver Certificates

1 $1 Bleached (Illegible)

3 Sets of Lincoln Memorial Cent Series

190 Counterfeit coins of various denominations and dates

57 Genuine but altered coins of various denominations and dates

31 Rings (3 of these rings are in custody of Metro Police Dept.)

No. 74-1244

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs

HAROLD VINCENT TOLIVER,
Defendant-Appellant.

ORDER

(Filed July 5, 1974)

Before PHILLIPS, Chief Judge, WEICK and ENGEL, Circuit Judges.

Based on information received from a reliable informer, corroborated by their own surveillance, Secret Service Agents arrested Toliver, searched his automobile, and seized counterfeit and altered United States coins. He was indicted on a two-count indictment which charged him with possessing false, forged, and counterfeit gold coins, with intent to defraud unknown persons, and fraudulently possessing altered United States coins, in violation of Title 18 U.S.C. §§ 485 and 331.

The District Court denied Toliver's motion to suppress the evidence seized.

We are of the opinion that there was substantial evidence which proved that the Secret Service Agents had probable cause to arrest Toliver, search his automobile, and seize the coins. United States v. McCreary, 455 F.2d 647 (6th Cir. 1972). The judgment of conviction is affirmed.

Entered by Order of the Court.

/s/ John P. Hehman
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-219

HAROLD VINCENT TOLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the search of his vehicle was unlawful because it was made without a warrant and was based upon information received from a informant who "never personally had any dealings with the petitioner in counterfeit or altered coins" (Pet. 6).

After a non-jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of possessing counterfeit gold coins and altered United States coins, in violation of 18 U.S.C. 485 and 331. He was sentenced to concurrent terms of two and one-half years' imprisonment. The court of appeals affirmed (Pet. App. A7).

1. The evidence, adduced at trial and at a pre-trial hearing on petitioner's motion to suppress, showed that on December 14, 1972, undercover Secret Service Agent MacVean Sweazey entered an antique shop owned by Alva Burchett, Jr., in Guthrie, Kentucky, and observed on display two gold coins. Burchett admitted to Sweazey that the coins were counterfeit and asked if he was interested in purchasing them. Sweazey replied that he was not but was prepared to place an order for bogus coins at a later date (Tr. 103-104).[1]

On December 27, Sweazey, accompanied by another undercover agent, again visited Burchett's store. This time they saw ten United States coins in a showcase. Burchett stated that all but two had been altered. Sweazey made a purchase of one counterfeit coin and one altered coin and indicated that if he was satisfied with these, a larger order would follow. Burchett disclosed that he could obtain unlimited quantities of such coins within ten days to two weeks of an order (Tr. 105-106, 205-206). On January 26, 1973, Sweazey placed an order for 107 counterfeit gold coins (Tr. 107-108).

On February 6, 1973, a confidential informant reported to Agent Russell Lasey that he had been told by Burchett that petitioner would be making a delivery of counterfeit coins to Guthrie from Manchester, Tennessee on the morning of February 8 (Tr. 54-55; H. 20-21). Lasey and other Secret Service agents mapped out the route most likely to be taken on such a trip. On the morning of February 8 he stationed men along the designated route. At 7:30 a.m. Lasey and Agent Harold Bibb observed petitioner exit his house and place a black bag and several

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[1]We are lodging with the Clerk of the Court the two-volume transcript of trial ("Tr.") and the one-volume transcript of the pre-trial hearing ("H.").

cartons in his car (H. 24). Lasey, Bibb, and other agents kept petitioner under constant surveillance as he left his house at 8:00 a.m. and proceeded as expected along the most direct route northwest from Manchester, in the middle of Tennessee, toward Guthrie, situated just across the border with Kentucky. When petitioner stopped at a roadside trash container, about five miles south of Guthrie, the agents arrested him and conducted a search of his car. They found therein the black case containing 185 counterfeit gold coins and 18 altered pennies. In addition, the agents discovered a coin book containing five counterfeit gold coins and 39 altered pennies[2] and an address book with an entry for Alva Burchett (Tr. 6-12, 38-39). Telephone toll records reflected the fact that petitioner had called Burchett frequently during December, January, and February (Tr. 158-161).

2. Petitioner claims that the warrantless search of his vehicle was unlawful because the agents relied upon uncorroborated "information * * * from an undisclosed source" (Pet. 6) who had no direct dealings with petitioner in counterfeit or altered coins and because the agents could have obtained a warrant to search the moving vehicle.

a. The informant had been associated with Agent Lasey for only three months before petitioner's arrest. Understandably, during that brief period no convictions had resulted from the use of the information received from the informant. However, the reliability of a confidential informant has never been deemed to depend necessarily upon prior convictions resulting from his information in the past. Here, according to Agent Lasey, "every piece of information received [from this inform-

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[2]All of the pennies had been altered by the addition of a "mint mark," *i.e.*, a letter placed next to the date on the coin, which customarily enhanced its value (Tr. 125, 141).

ant] was verified" (H. 29-30). Accordingly, when the informant passed along his information regarding petitioner and revealed that his own source was Burchett, the Secret Service--which had long suspected petitioner of dealing in counterfeit coins (H. 21-22) and knew from independent personal observations that Burchett was so involved--had ample reason to investigate. The surveillance of the petitioner, which verified the informant's information, provided probable cause to believe that petitioner was transporting counterfeit and altered coins to Burchett. *United States* v. *Harris*, 403 U.S. 573; *Spinelli* v. *United States*, 393 U.S. 410; *Aguilar* v. *Texas*, 378 U.S. 108; *Draper* v. *United States*, 358 U.S. 307; *United States* v. *Burch*, 471 F.2d 1314 (C.A. 6).[3]

b. The information received from the informant before it was verified by surveillance of petitioner was inadequate to support the issuance of a search warrant. It was only after petitioner had been seen loading his vehicle, departing at about the predicted time, and traveling on the most direct course to Guthrie, that the Secret Service agents clearly were justified in believing that petitioner was committing an offense. They were not required to wait until petitioner actually had arrived in Guthrie prior to stopping him, since the requisite probable cause existed before the vehicle reached its destination point. Nor were the agents required to obtain a warrant before arresting petitioner and searching his movable vehicle at the roadside five

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[3]In *Burch* the court of appeals set forth seven items known to the police, including the confidential informant's personal dealings with the defendant, and concluded that in light of this information there was probable cause to believe that the defendant was violating the narcotics laws at the time of his arrest. The court did not indicate, as petitioner suggests (Pet. 6), that probable cause would not have existed in *Burch* if there had been no direct dealings between the defendant and the informant.

miles from Guthrie. *Chambers* v. *Maroney*, 399 U.S. 42; *Brinegar* v. *United States*, 338 U.S. 160; *Carroll* v. *United States*, 267 U.S. 132; see *United States* v. *Summerville*, 477 F.2d 393 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11